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No. 231

In the Supreme Court of the United States

OCTOBER TERM, 1930

DAVID BURNET, COMMISSIONER OF INTERNAL REVENUE, PETITIONER

v.

CHICAGO RAILWAY EQUIPMENT COMPANY

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE PETITIONER

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BRIEF FOR THE UNITED STATES

OPINIONS BELOW

The opinion of the Board of Tax Appeals (R. 107) is reported in 13 B. T. A. 471, and the opinion of the United States Circuit Court of Appeals for the Seventh Circuit (R. 123), reversing in part the determination of the Board, is reported in 39 F. (2d) 378.

JURISDICTION

The decree of the United States Circuit Court of Appeals for the Seventh Circuit was entered March 27, 1930. (R. 127.) The petition for a writ of certiorari was filed June 27, 1930 (R. 128), and was granted on October 13, 1930 (R. 128). The

jurisdiction of this Court rests on Section 240 (a) of the Judicial Code as amended by the Act of February 13, 1925.

QUESTION PRESENTED

Whether the statutory period of limitation for the assessment of income and profits taxes for 1918 was extended by a waiver executed after such period had expired, and after the Commissioner had determined the taxes and after the taxpayer had filed an appeal with the Board of Tax Appeals.

STATUTES INVOLVED

The statutes involved are set out in the Appendix, *infra,* pp. 13–18.

STATEMENT

Respondent's income and profits tax return for 1918 was filed June 16, 1919 (R. 106), and the five-year period of limitation for assessment and collection fixed by Section 277 (a) (2) of the Revenue Act of 1924 (*infra*, p. 14) expired June 16, 1924. This limitation is qualified by Section 278 (d) of the same Act (*infra,* p. 15), which permits collection of assessments made after June 2, 1924, within six years after the date of assessment. The Commissioner determined a deficiency in taxes for 1918 and on March 14, 1925, mailed a notice of this deficiency to the respondent, who received it in due course. (R. 22.) The respondent filed an appeal with the Board of Tax Appeals on May 6, 1925. (R. 106.) On December 7, 1925, the Solicitor

of Internal Revenue sent respondent a letter in which he stated that "as it is impossible at this time to determine whether the case [before the Board of Tax Appeals] will be disposed of by the board prior to the expiration of the period of your waiver," a further waiver should be executed, and on December 10, 1925, respondent executed a waiver extending the time for making assessment. (R. 106, 107.) The only waiver introduced in evidence before the Board was that of December 10, 1925. On the other hand, no evidence was introduced in contradiction of the reference to a prior waiver contained in the Solicitor's letter.

No notice of deficiency was sent after the waiver of December 10, 1925, was executed. That waiver read as follows (R. 106):

> CHICAGO, *December 10, 1925.*
>
> In pursuance of the provisions of existing internal revenue laws, Chicago Railway Equipment Co., a taxpayer of 1928 West 46th Street, Chicago, Ill., and the Commissioner of Internal Revenue hereby waive the time prescribed by law for making any assessment of the amount of income, excess-profits, or war-profits taxes due under any return made by or on behalf of said taxpayer for the year (or years) 1917, 1918, and 1919 under existing revenue acts, or under prior revenue acts.
>
> This waiver of the time for making any assessment as aforesaid shall remain in effect until December 31, 1926, and shall then expire except that if a notice of a deficiency

in tax is sent to said taxpayer by registered mail before said date and (1) no appeal is filed therefrom with the United States Board of Tax Appeals then said date shall be extended sixty days, or (2) if an appeal is filed with said Board then said date shall be extended by the number of days between the date of mailing of said notice of deficiency and the date of final decision by said board.

CHICAGO RAILWAY EQUIPMENT CO.
(Signed) E. T. WALKER,
Secretary.

This waiver was duly executed by the respondent over its corporate seal and was accepted and signed by the Commissioner of Internal Revenue. (R. 107.)

On July 28, 1926, the Board decided the case on its merits. 4 B. T. A. 452. This decision was reversed by the Circuit Court of Appeals for the Seventh Circuit and the case was remanded to the Board for further proceedings. 20 F. (2d) 10. By supplemental petition, the taxpayer then for the first time contended that the assessment and collection of any deficiencies for 1917, 1918, and 1919 were barred by statutes of limitations. (R. 22–23.) On September 24, 1928, the Board decided that none of these taxes was so barred. (R. 107.) 13 B. T. A. 471. On March 27, 1930, the Circuit Court of Appeals affirmed the decision of the Board as to 1919 taxes, but reversed it as to 1917 and 1918 taxes on the ground that the waiver of December

10, 1925, was invalid because executed after the statute of limitations had run. (R. 123.) 39 F. (2d) 378. The case as presented to this Court relates only to the 1918 taxes.

SPECIFICATION OF ERROR TO BE URGED

The Circuit Court of Appeals erred in holding that the waiver of the period of limitation for assessing the 1918 taxes was invalid.

SUMMARY OF ARGUMENT

A beneficiary under a statute of limitations may ordinarily waive the benefit after the bar of the statute has intervened. The applicable statute, Section 278 (c) of the Revenue Act of 1924, c. 234, 43 Stat. 253, 300, does not require that a waiver, to be effective, should be executed before the statute has run.

The instant waiver should be construed to apply to and validate the determination of deficiency made before the waiver was executed.

If the waiver is valid and applicable, it operates to extend the time for assessment of the tax until after the decision of this case by this Court. Collection may be made at any time within six years after the assessment.

ARGUMENT

I

The five-year period for assessment of the 1918 tax, fixed by Section 277 (a) (3) of the Revenue Act of 1926, as well as by Section 277 (a) (2) of the

Revenue Act of 1924 (*infra*, p. 14), expired June 16, 1924. On March 14, 1925, the Commissioner determined that an additional amount should be assessed, and mailed the respondent a notice of deficiency. On December 10, 1925, the taxpayer and the Commissioner executed a waiver of the time for making assessment of the tax for 1918 (*supra*, pp. 3–4). This waiver by its terms was to remain in effect at least until December 31, 1926, and longer in certain events.

We maintain that the time for assessment will not expire until after the final decision of this case, because the petitioner on May 6, 1925, had filed an appeal from that determination with the Board of Tax Appeals and because the waiver provides that if an appeal is filed with the Board the time for making assessment shall be extended until the final decision of the Board.

The Circuit Court of Appeals held that the waiver was invalid because executed after the statutory period governing assessment had expired. (R. 124.) The court cited in support of this proposition its own decision in *Pictorial Printing Co.* v. *Commissioner*, 38 F. (2d) 563, but did not discuss the matter. Neither in the case cited nor in the instant case did the court rely upon any language in any statute.

We submit that, unless the language of a statute expressly provides otherwise, a waiver of assessment executed after the expiration of the period for assessment is valid. The argument of the Gov-

ernment on this point is fully presented on pages 6 to 14 of its revised brief in *Stange* v. *United States*, No. 23, current term.

We also submit that no applicable statute invalidates waivers given after the period for assessment has expired. As the determination of deficiency in this case was made after the passage of the Revenue Act of 1924 (which was approved on June 2, 1924), the assessment of the taxes is subject to the provisions of that Act, by virtue of the express language of Section 280 of that Act (*infra*, pp. 15–16). Although Section 277 (a) (2) of that Act (*infra*, p. 14) stipulates that the tax for 1918 shall be assessed within five years after the return was filed, that stipulation is subject to the provisions of Section 278, subdivision (c) of which reads:

> Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon.

This section does not expressly provide that the consent must be given prior to the expiration of the statutory period for assessment, and we submit that it is not reasonably susceptible of that interpretation.

An examination of the provisions of other Revenue Acts in regard to waivers supports this contention. The only provision in regard to waivers contained in any earlier Act was that in Section

250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, which provided that the tax should be determined and assessed within five years after the return was filed, "unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax." The Reports of the Committees of both the House and the Senate which passed the Revenue Act of 1924, under the heading "Section 278 (c)" said merely, "A substantially similar provision is included in section 250 (d) of the existing law." (68th Congress, 1st Session, House Report No. 179, p. 26; Senate Report No. 398, p. 32.)

It is significant that the language of Section 278 (c) of the Revenue Act of 1924 is materially different from Section 506 (a) of the Revenue Act of 1928 which provides in part:

> Where *before the expiration of the time prescribed in section 277 for the assessment of the tax*, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. [Italics ours.]

There is nothing in the legislative history of the later Act which throws any light upon the view which Congress took of the earlier Act[1] when passing the later statute. Consequently, it seems fair to assume that the explicit language of Sec-

[1] The exact language of Section 278 (c) of the Revenue Act of 1924 was reenacted in Section 278 (c) of the Revenue Act of 1926.

tion 506 (a) was intended to effect a change. Further support for this contention is found in the fact that Section 506 (c) provides that "The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed." See also Section 506 (b), p. 18, *infra*. But see *Joy Floral Co.* v. *Commissioner*, 29 F. (2d) 865 (Ct. App. D. C.).

Conceivably, it may be argued that the language of Section 278 (c) refers only to waivers executed prior to the date of the passage of that Act, which was June 2, 1924. That this is not the proper construction of the language is made certain by Section 281 (e) of this Act, relating to credits and refunds, which expressly refers to waivers of assessment filed on or before June 15, 1924 (*infra*, p. 16). See also Section 284 (g) of the 1926 Act.

We submit that Section 278 (c) refers to all waivers executed prior to the making of the assessment, at last

II

The taxpayer has contended that the waiver of December 10, 1925, can not refer to a determination of a deficiency already made and to an appeal already taken to the Board. The waiver consented that an assessment be made after the time fixed by statute. This assessment has not yet been made.

The determination made before the waiver was executed is not final until after the decision of the Board becomes final. We submit that the waiver must have been intended to refer to the deficiency already determined, and that its language is broad enough to include that deficiency. As appears from an inspection of the document itself, the waiver was on the standard mimeographed form regularly used, and this explains the fact that its language is not peculiarly adapted to the situation in the instant case.[2]

The situation is similar to that discussed by the Board of Tax Appeals in *Aiken* v. *Commissioner*, 10 B. T. A. 553, in which the Board said (pp. 561–562):

> Although at the date the assessments were made all remedies were barred, the liability was still in existence. Under these circumstances, petitioner and respondent agreed to "waive the time prescribed by law for making any assessment" and that such period should continue until December 31, 1926, with further provisions relative to notice of deficiency and appeal to the Board. It is clear that these agreements would have validated any assessments made after their effective date and prior to the expiration of the agreed period, and we perceive no reason why they did not give equal validity to the

[2] The printed record does not give a complete copy of the waiver. It was introduced in evidence before the Board as Petitioner's Exhibit 3. (R. 72.) The original, so marked, has been filed with the Clerk of this Court.

> assessments which were then in existence. The liability for the taxes remained and they could have been reassessed. This would have been a duplication of what had been done and obviously a work of supererogation. All that was necessary to revive the remedies was an agreement made pursuant to Section 278 (c). Such an agreement was executed and since the effect of the agreement was to revive the remedies, it follows that the prior assessments, although dormant, were revived and made effective by the agreements.

It must be assumed that the notice of deficiency was sent by registered mail. The record shows merely that it was mailed to the taxpayer on March 14, 1925 (R. 106), and that it was received by the taxpayer (R. 22). In the absence of a distinct finding to the contrary, it must be presumed that the Commissioner acted in accordance with the statutory provision requiring all notices of deficiency to be sent by registered mail (Revenue Act of 1924, Sec. 274 (a), *infra*, p. 13).

III

The only remaining question is whether it is still open to the Government to assess and collect the tax.

The respondent on May 6, 1925, filed an appeal with the Board of Tax Appeals. The waiver (*supra*, pp. 3–4), as we construe it, provides that the time for making assessment, in the events

which have happened, shall not expire until "the date of final decision" of the Board. That decision will not become final until thirty days after the issuance of the mandate of this Court, under the provisions of Section 1005 (a) of the Revenue Act of 1926 (*infra*, p. 16). The result is that the bar has not yet fallen upon the assessment. Since the assessment is not yet barred, collection may be made under Section 278 (d) of the Revenue Act of 1926, as amended by Section 506 (a) of the Revenue Act of 1928 (*infra*, p. 17), within six years after the assessment. *Cf. Florsheim Bros. Co. v. United States*, 280 U. S. 453.

CONCLUSION

It is respectfully submitted that the decision of the court below holding that the statute of limitations had barred the assessment of the 1918 taxes is erroneous and should be reversed, with directions to that court to affirm the order of the Board with regard to the 1918 taxes.

THOMAS D. THACHER,
Solicitor General.
CHARLES B. RUGG,
Assistant Attorney General.
CLAUDE R. BRANCH,
Special Assistant to the Attorney General.
JOSEPH H. SHEPPARD,
BRADLEY B. GILMAN,
Attorneys.

NOVEMBER, 1930.

APPENDIX

STATUTES INVOLVED

Section 250 (d) of the Revenue Act of 1921, c. 136, 42 Stat. 227, 265, provides in part:

> The amount of income, excess-profits, or war-profits taxes due * * * under prior income, excess-profits, or war-profits tax Acts * * * shall be determined and assessed within five years after the return was filed, unless both the Commissioner and the taxpayer consent in writing to a later determination, assessment, and collection of the tax; * * *

Section 274 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 297, provides in part:

> (a) If, in the case of any taxpayer, the Commissioner determines that there is a deficiency in respect of the tax imposed by this title, the taxpayer, except as provided in subdivision (d), shall be notified of such deficiency by registered mail, but such deficiency shall be assessed only as hereinafter provided. Within 60 days after such notice is mailed the taxpayer may file an appeal with the Board of Tax Appeals established by section 900.
>
> (b) If the Board determines that there is a deficiency, the amount so determined shall be assessed and shall be paid upon notice and demand from the collector. No part of the amount determined as a deficiency by the Commissioner but disallowed

as such by the Board shall be assessed, but a proceeding in court may be begun, without assessment, for the collection of any part of the amount so disallowed. The court shall include in its judgment interest upon the amount thereof at the rate of 6 per centum per annum from the date prescribed for the payment of the tax to the date of the judgment. [Such proceeding shall be begun within one year after the final decision of the Board, and may be begun within such year even though the period of limitation prescribed in section 277 has expired. [U. S. C., Title 26, Secs. 1048–1049.]

Sections 277 and 278 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 299, 300, 301, provide in part:

SEC. 277. (a) Except as provided in section 278 * * *—

* * * * *

(2) The amount of income, excess-profits, and war-profits taxes imposed by * * * the Revenue Act of 1917, the Revenue Act of 1918, and by any such Act as amended, shall be assessed within five years after the return was filed, and no proceeding in court for the collection of such taxes shall be begun after the expiration of such period.

* * * * *

(b) The period within which an assessment is required to be made by subdivision (a) of this section in respect of any deficiency shall be extended (1) by 60 days if a notice of such deficiency has been mailed to the taxpayer under subdivision (a) of section 274 and no appeal has been filed with the Board of Tax Appeals, or, (2) if an appeal has been filed, then by the number of days between the date of the mailing of such

notice and the date of the final decision by the Board. [U. S. C. Title 26, Sec. 1057.]

* * * * *

SEC. 278. * * *

* * * * *

(c) Where both the Commissioner and the taxpayer have consented in writing to the assessment of the tax after the time prescribed in section 277 for its assessment the tax may be assessed at any time prior to the expiration of the period agreed upon. [U. S. C., Title 26, Sec. 1060.]

(d) Where the assessment of the tax is made within the period prescribed in section 277 or in this section, such tax may be collected by distraint or by a proceeding in court begun within six years after the assessment of the tax. Nothing in this Act shall be construed as preventing the beginning, without assessment, of a proceeding in court for the collection of the tax at any time before the expiration of the period within which an assessment may be made. [U. S. C., Title 26, Sec. 1061.]

Section 280 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 301, provides:

If after the enactment of this Act the Commissioner determines that any assessment should be made in respect of any income, war-profits, or excess-profits tax imposed by the Revenue Act of 1916, the Revenue Act of 1917, the Revenue Act of 1918, or the Revenue Act of 1921, or by any such Act as amended, the amount which should be assessed (whether as deficiency or as interest, penalty, or other addition to the tax) shall be computed as if this Act had not been enacted, but the amount so computed shall

be assessed, collected, and paid in the same manner and subject to the same provisions and limitations (including the provisions in case of delinquency in payment after notice and demand) as in the case of the taxes imposed by this title, except as otherwise provided in section 277. [U. S. C., Title 26, Sec. 1064.]

Section 281 of the Revenue Act of 1924, c. 234, 43 Stat. 253, 302, provides in part:

SEC. 281. * * *

* * * * *

(e) If the taxpayer has, within five years from the time the return for the taxable year 1917 was due, filed a waiver of his right to have the taxes due for such taxable year determined and assessed within five years after the return was filed, or if he has, on or before June 15, 1924, filed such a waiver in respect of the taxes due for the taxable year 1918, then such credit or refund relating to the taxes for the year in respect of which the waiver was filed shall be allowed or made if claim therefor is filed either on or before April 1, 1925, or within four years from the time the tax was paid. [U. S. C., Title 26, Sec. 1066.]

Section 1005 of the Revenue Act of 1926, c. 27, 44 Stat. 9, 110, provides in part:

SEC. 1005. (a) The decision of the Board shall become final—

* * * * *

(4) Upon the expiration of 30 days from the date of issuance of the mandate of the Supreme Court, if such Court directs that the decision of the Board be affirmed or the petition for review dismissed.

(b) If the Supreme Court directs that the decision of the Board be modified or reversed, the decision of the Board rendered in accordance with the mandate of the Supreme Court shall become final upon the expiration of 30 days from the time it was rendered, unless within such 30 days either the Commissioner or the taxpayer has instituted proceedings to have such decision corrected to accord with the mandate, in which event the decision of the Board shall become final when so corrected. [U. S. C. App., Title 26, Sec. 1228.]

Section 506 of the Revenue Act of 1928, c. 852, 45 Stat. 791, 870, provides in part:

Sec. 506. Waivers after expiration of period of limitation.—(a) Section 278 (c) and (d) of the Revenue Act of 1926 are amended to read as follows:

"(c) Where before the expiration of the time prescribed in section 277 for the assessment of the tax, both the Commissioner and the taxpayer have consented in writing to its assessment after such time, the tax may be assessed at any time prior to the expiration of the period agreed upon. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

"(d) Where the assessment of any income, excess-profits, or war-profits taxes imposed by this title or by prior Act of Congress has been made (whether before or after the enactment of this Act) within the period of limitation properly applicable thereto, such tax may be collected by distraint or by a proceeding in court (begun before or after the enactment of this Act), but only if begun

(1) within six years after the assessment of the tax, or (2) prior to the expiration of any period for collection agreed upon in writing by the Commissioner and the taxpayer before the expiration of such six-year period. The period so agreed upon may be extended by subsequent agreements in writing made before the expiration of the period previously agreed upon."

(**b**) Section 278 of the Revenue Act of 1926 is further amended by adding at the end thereof a new subdivision to read as follows:

"(f) Any agreement which would be within the provisions of subdivision (c) or (d) of this section but for the fact that it was executed after the expiration of the period of limitation extended by such agreement, shall be valid and effective according to its terms if entered into after the enactment of the Revenue Act of 1928 and before January 1, 1929."

(**c**) The amendments made by this section to the Revenue Act of 1926 shall not be construed as in any manner affecting the validity of waivers made prior to the enactment of this Act, which shall be determined according to the law in existence at the time such waiver was filed. [U. S. C. Sup. III, Title 26, Sec. 2506.].